United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2572

IN THE
UNITED STATES COURT OF
APPEALS FOR THE SECOND
CIRCUIT

DOCKET NO. 74-2527

B
P/S

ALPHONSE JOHNSON
APPELLANT

VS.
UNITED STATES OF AMERICA
APPELLEE

ON APPEAL FROM JUDGMENT OF
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF ON BEHALF OF APPELLANT

ALPHONSE JOHNSON
P.O. BOX 1000
MARION, ILLINOIS 62959

TABLE OF CASES

TABLE OF STATUTES

TITLE 18 U.S.C. Section 4209...

TITLE 18 U.S.C. Section 5005 et seq.

OPINIONS BELOW

Exhibits "A" and "B"

STATEMENT OF THE ISSUE

WAS THE APPELLANT DENIED DUE PROCESS BECAUSE HE WAS DEPRIVED OF HIS CLAIMED RIGHT TO BE SENTENCED UNDER THE YOUTH ADULT OFFENDER'S ACT, WITHOUT A REASONED EXPLANATION ON THE RECORD FOR THE ASSERTED DEPRIVATION.

STATEMENT OF FACTS

The Appellant, Alphonse Johnson, was tried on November 30, 1971 subsequent to a seven (7) count indictment returned by a New Haven Federal Grand Jury. On December 21, 1971 the jury deliberated for approximately two hours and found Appellant guilty on all counts as charged. Consequently, Appellant Johnson received a nineteen (19) year sentence from the District Court, via Honorable Judge Zampano.

The Appellant contended, initially, that at the time of sentence he was 22 years old. However, subsequent to the District Court's order filed October 21, 1974 (See: Exhibit "A"), Appellant conceded that he was in error about his age at the time of sentence. But, in Appellant's Petition For Rehearing he alleged that at 23 years of age he was a Young Adult Offender pursuant to 18 U.S.C. Section 4209, and was eligible by virtue of his age, for the treatment provided under the Federal Corrections Act, 18 U.S.C. Section 5005 et seq., and could have been sentenced pursuant to its provisions (See: United States vs. Schwarz, 500 F2d 1350 (1974).) The Petition For Rehearing was denied (See: Exhibit "B").

The Appellant filed a timely notice of appeal and affidavit of poverty to proceed on appeal. The Appellant found out from the Honorable Clerk of this Court on January 9, 1975, that the District Court had permitted him to proceed on appeal in forma pauperis in December 17, 1974 - the Appeallant was never notified by the lower Court.

The lower Court never explained to the Appeallant as to why the Petition For Rehearing was denied. The Court stated on the side of Appellant's Petition: "Petition denied" (See: Exhibit "B", supra)

This appeal therefore follows:

ARGUMENT

WAS THE APPELLANT DENEID DUE PROCESS BECAUSE HE WAS DEPRIVED OF HIS CLAIMED RIGHT TO BE SENTENCED UNDER THE YOUTH ADULT OFFENDER'S ACT, WITHOUT A REASONED EXPLANATION ON THE RECORD FOR THE ASSERTED DEPRIVATION.

At the outset "the appellant was eligible by virtue of...age and as a 'young adult offender," 18 U.S.C. Section 4209, for the treatment provided under the Federal Youth Corrections Act, 18 U.S.C. Section 5005 et. seq., and could have been sentenced pursuant to its provisions." See: United States v. Schwarz 500 F2d 1350 (1974). Yet, Appellant was deneid, via deprivation, without a reasoned explanation on the record for the asserted deprivation. The Appellee may contend that since Appellant was sentenced prior to United States v. Kaylor, 491 F2d 1133 (2nd Cir. 1974), and that since this Court did not apply Kaylor retroactively an explanation is not required. Which, in effect, would be saying that Appellant has and was at the time of sentencing, stripped of his constitutional rights pursuant, in particularly, to the 5th Amendment. At least one Court of Appeals, prior to Appellant receiving his sentence, acknowledged that the Court's failure to advert either to the Youth Corrections Act or Young Adult Offender's provision was due to inadvertence. See: United States vs. Wilson, 450 F2d 495 (1971). This Court, Via the Honorable Judge Oakes relied upon Wilson in part, at least subsequent thereto stating that: "To do less in the context of the sentencing of youth offenders or to require anything less than a statement of the underpinning beneath the explicit finding would be neglecting our solemn obligation to carry out the congressional mandate expressed in the Act itself and in its legislative history above recounted." The Appellant respectfully submits that the

legislative history mentioned, concerning the Act herein, came into being in 1950. It was the Congressional intent that an explicit finding be exercised by the Court even as far back as 1950.

An explicit finding that Appellant would not have benefited from treatment under the Act would have removed and effaced all doubt concerning whether the enlarged discretion Congress provided to sentencing Courts was indeed exercised. The Youth Corrections Act, Section 5010(d) of Title 18 states in pertinent part that: "If the courts shall find that the Youth Offender will not derive benefit..." The Appellant is here contending that the words "shall find" implies that Appellant was entitled to the due process clause.

The Appellant must also mention the fact that, at the time of United States vs. Wilson, supra, was rendered Appellant had yet to be sentenced. This Court, prior to Kaylor, had yet to rule on an issue which was raised by Kaylor, consequently, Wilson and also United States vs. Daniels, 446 F2d 967, 971-972 (6th Cir 1971), were useful guidelines for this Court to use. Again, both of these cases were rendered prior to the Appellant being sentenced.

Furthermore, at the time this Court rendered its decision in Kaylor, the Supreme Court had yet to render the opinion of United States v. Dorszynski, 484 F2d 849 (7th Cir), cert. granted, _____U.S. ____, 94 S.Ct. 721, 38 L.Ed. 2d 548 (1973). Soon thereafter, however, the Dorszynski's opinion was rendered and the Supreme Court concluded, as this Court did in Kaylor, that an explicit finding would have to be determined. The Supreme Court, however, did not hold prospective application only. In light of Dorszynski, retroactively should be avoided as there will be "substantial inequitable results." Cipriano vs. City of Houma, 395 U.S. 701, 706 (1969).

In concluding, the Supreme Court most certainly implied that your Appellant is entitled to the due process clause:

> "Such a finding would make unmistakably clear that the sentencing Judge was not only aware of the existence of the new act, but also knew that the youth offender before him was eligible because of his age for the treatment it provided to accomplish its important purpose."
> DORSZYNSKI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the District Court should be reversed and remanded.

Respectfully Submitted

/s/ Alphonse Johnson

Alphonse Johnson
P.O. Box 1000
Marion, Illinois 62959

Subscribed and sworn to before me this 20 day of January, 1975.

Charles Craig
notary

Authorized by the Act of July 7, 1955
to Administer Oaths (18 U. S. C. 4004)

CERTIFICATE OF SERVICE

I, Alphonse Johnson, Appellant herein, bereby aver that the original and three (3) copies of the Brief, Docket No. 74-2527, have been forwarded to:

A. Daniel Fusaro
Honorable Clerk
U.S. Court of Appeals
Second Circuit
U.S. Courthouse
Foley Square
New York, N.Y. 10007

and one (1) copy served upon:

U.S. District Attorney
U.S. District Court
District of Connecticut
Federal Building
New Haven, Connecticut 06505

Acknowledge receipt and return to:

Alphonse Johnson
P.O. Box 1000
Marion, Illinois 62959

Respectfully Submitted

/s/ Alphonse Johnson
Alphonse Johnson

Subscribed and sworn to before me

this 20 of January, 1975.

Charles Craig
notary

Authorized by the Act of July 7, 1955
to Administer Oaths (18 U.S.C. 4004)

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UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ALPHONSE JOHNSON	:	
v.	:	CIVIL NO. N 74-245
UNITED STATES OF AMERICA	:	

RULING ON DEFENDANT'S MOTION
PURSUANT TO 18 U.S.C. § 2255

The petitioner, Alphonse Johnson, convicted of bank robbery and sentenced to 19 years imprisonment by this Court on February 10, 1972, moves under 18 U.S.C. § 2255 to have his sentence vacated. He contends that the Court erred when at the time of sentencing it failed to make an affirmative explicit finding that the petitioner would not derive a benefit from treatment under the Youth Corrections Act, 18 U.S.C. § 5010(d).

Since the petitioner was 22 years of age when he was convicted and 23 years old when sentenced, he was a young adult offender and not a youth offender. See 18 U.S.C. § 5006(e). Therefore, an express finding of "no benefit" under the Act was not required. United States v. Kaylor, 491 F.2d 1133 (2 Cir. 1974).

Accordingly, the motion is denied; the papers may be filed without fee.

Dated at New Haven, Connecticut, this 17th day of October, 1974.

Robert C. Zampano
United States District Judge

Exhibit 2

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ALPHONSE JOHNSON	:	
v.	:	CIVIL NO. N 74-245
UNITED STATES OF AMERICA	:	

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Accordingly, the motion is denied; the papers may be filed without fee.

Dated at New Haven, Connecticut, this 17th day of October, 1974.

Robert C. Zampano
United States District Judge